Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-70

IN THE

Supreme Court of the United States

October Term, 1989

CARTER T. G. KUEHN,

Petitioner,

v.

COUNCIL NO. 65, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA

BRIEF IN OPPOSITION OF RESPONDENT PUBLIC EMPLOYMENT RELATIONS BOARD

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QUESTIONS PRESENTED FOR REVIEW

I. Does a notice of fair share fee assessment that details expenditures categorized as chargeable and non-chargeable to the fair share payor satisfy the requirements of *Chicago Teacher's Union, Local No. 1 v. Hudson* that the information given be sufficient for the payor to gauge the propriety of the assessment?

II. Does the inclusion of per capita tax payments of affiliated organizations in petitioner's fair share fee assessment violate his rights under the First and Fourteenth Amendments to the Constitution of the United States where the courts below have found that these affiliated organizations provide services to the exclusive representative in its collective bargaining and contract administration responsibilities?

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Respondent, Minnesota Public Employment Relations Board, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Court of Appeals' decision in this case. That opinion is reproduced in Appendix B to the petition and is reported at 435 N.W.2d 130 (Minn. Ct. App. 1989).

STATEMENT OF THE CASE

This case arises from a challenge filed by Petitioner Kuehn to the procedures surrounding a fair share fee assessment. A "fair share fee" is a fee that a union, certified to meet and negotiate with the employer on behalf of all employees in the appropriate unit, may charge employees who are not members of the union but who benefit from the services rendered by the union. Kuehn is a non-union employee of Crow Wing County, Minnesota, and a member of the collective bargaining unit for which Respondent American Federation of State, County and Municipal Employees, Council 65 ("AFSCME Council 65") is the exclusive representative.

In August 1986, Kuehn was notified of a fair share fee assessment by AFSCME Council 65 pursuant to Minn. Stat. § 179A.06, subd. 3 (1986). (Petition, Appendix E.) On October 6, 1986, AFSCME Council 65 sent Kuehn a second, amended notice of fair share fee assessment which included detailed financial data consisting of a breakdown of expenditures categorized as chargeable and non-chargeable to the fair share payor. It is this second notice of assessment which forms the basis of Kuehn's petition.

Minnesota Statutes § 179A.06, subd. 3 requires a union to provide advance, written notice of a fair share fee assessment. The contents of this notice are prescribed in Minn. Rules, pt. 5510.1410 (1989), which was revised soon after this Court's decision in *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) and which incorporates the requirements contained in that opinion. (PERB, Appendix A-1.)

Unhappy with the assessment made by AFSCME Council 65, Kuehn filed a formal challenge to the assessment with the Bureau of Mediation Services ("BMS"). The BMS is a state agency authorized by statute to hear and decide all issues in a

fair share fee challenge. Minn. Stat. § 179A.04, subd. 1(e) (1988). (PERB, Appendix A-2.) Specifically, Kuehn complained that the August and October notices of the fair share fee assessment were insufficient, making it impossible for him to gauge the appropriateness of the assessed fair share fee. The BMS entertained Kuehn's challenge at several evidentiary hearings. On December 4, 1987, the BMS determined that the August 1986 notice of assessment was insufficient and ordered AFSCME Council 65 to refund to Kuehn any deductions made prior to the October 6, 1986, notice. The BMS found that the October notice comported with all statutory and rule requirements and constituted adequate notice. Accordingly, it held that assessments made after this second notice were proper. (Petition, Appendix D.)

Kuehn appealed the BMS decision to the Public Employment Relations Board ("PERB"). PERB is the state agency authorized to hear appeals from BMS decisions relating to fair share fee challenges. Minn. Stat. § 179A.05, subd. 4(c) (1988). (PERB, Appendix A-3.) At the PERB hearing on the matter, Kuehn again challenged the procedures surrounding the notices of fair share fee assessment, but framed this issue in constitutional terms. Kuehn claimed that the union's notice procedures constituted a violation of his First and Fourteenth Amendment rights under the United States Constitution. Following this hearing, PERB affirmed BMS's decision, specifically finding that the October 6, 1986, notice of fair share fee assessment was adequate. (Petition, Appendix C.)

Still dissatisfied, Kuehn brought his case to the Minnesota Court of Appeals by writ of certiorari. The court considered Kuehn's constitutional challenges. On January 23, 1989, following briefing and oral argument, the court of appeals affirmed PERB's decision regarding the adequacy of the October

6, 1986, notice of fair share fee assessment and determined that Minn. Stat. § 179A.06, subd. 3 (1986) did not violate a fair share fee payor's First and Fourteenth Amendment rights under the United States Constitution, either on its face or as applied by the BMS and PERB. The court of appeals also held that organizations affiliated with AFSCME Council 65 may assess fair share fees pursuant to Minn. Stat. § 179A.06, subd. 3. The Minnesota Supreme Court denied Kuehn's Petition for Review of the Decision of the Court of Appeals on April 18, 1989. (Petition, Appendix A.)

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied because petitioner has failed to show that there are "special and important reasons" for this Court to grant discretionary review as mandated by Supreme Court Rule 17.

THE MINNESOTA COURT OF APPEALS' DECISION IN THIS CASE DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *CHICAGO TEACHER'S UNION, LOCAL NO. 1 V. HUDSON.*

Rule 17, subd. 1(c) of the Supreme Court Rules provides that one basis for the grant of certiorari is the existence of a conflict between a decision by a state court and an applicable decision of this Court. In order to demonstrate such a conflict, a petitioner must do more than allege the possibility of one. Instead, a grant of certiorari is justified only by a direct and apparent conflict. No such conflict exists here.

The basis for Kuehn's petition is a perceived conflict between the notice requirement criteria enunciated in *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986)

and that applied by the Minnesota Court of Appeals in examining the notice afforded Kuehn by AFSCME Council 65. Prior decisions of this Court have firmly established the constitutionality of a fair share fee assessment. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). More recently, this Court set out the procedural safeguards necessary to protect a non-union employee's constitutional rights incident to the imposition of a fair share fee assessment in its decision in *Hudson*. The *Hudson* decision established the general principle that potential objectors to a fair share fee assessment must be given sufficient information so as to enable them to gauge the propriety of the union's assessment. *Hudson*, 475 U.S. at 307. Significantly, this Court did not prescribe a rigid formula to meet this requirement. Rather, *Hudson* directs that "basic considerations of fairness" should determine the notice requirement. The decision below presents no conflict with these fundamental principles established in *Hudson*. Attempting to manufacture conflict where none exists, petitioner imposes on *Hudson* a procedurally oppressive interpretation that it cannot logically support.

Relying on *dicta* found in a footnote in *Hudson*, Kuehn first argues that the fair share fee notice in this case is deficient because it lacks an independent auditor's verification of the accompanying financial data. This broad assertion is factually imprecise and legally incorrect. The financial statements provided by AFSCME Council 65, as well as those of AFSCME International, are audited financial statements. The financial data of AFSCME Local 65 represents direct statements from its records. While post-*Hudson* authority rejects a fair share fee notice predicated solely on a union's determination of chargeable expenses, it does not necessarily require an

independent auditor's verification of every financial statement. Nor does *Hudson* enunciate such a rule. Kuehn's argument is based on a footnote in the *Hudson* decision which declares a preference for audited financial data. This footnote, however, is merely dicta and as such does not create a conflict of law. Even if a footnote could form the basis for a conflict, this one does not. This footnote only suggests one method of accomplishing the broad principles of fairness and disclosure enunciated in the decision.

In *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987), non-union employees challenged the procedures used by the union in computing their fair share fee. The employees asserted that these procedures were constitutionally deficient because an independent auditor did not verify the financial information that the unions use to classify expenses into the various categories of expenditures as required by *Hudson*. In examining this issue, the court determined that the employees' reading of *Hudson* was overly broad. The court found that *Hudson* required only that the usual function of an auditor be fulfilled and defined that function as an assurance of legitimized expenditures. The *Andrews* court concluded that the union's current procedures supplied the necessary assurance. In the instant matter, the required procedural assurance of legitimized expenditures was supplied to Kuehn through financial data detailing categorized expenses and through extensive post-assessment hearings held by both the BMS and PERB. For Kuehn to suggest that further procedural safeguards are necessary is absurd and contrary to the principles enunciated in *Hudson*.

The *Hudson* decision expressly reaffirms the principle first stated in *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), that practicalities may dictate a lack of absolute precision in calculating the fair share fee of non-members. Quoted in

Hudson, 475 U.S. at 307, n. 18; *Abood v. Detroit Board of Education*, 431 U.S. 209, 239-240, n. 40 (1977). This moderating principle is the framework for *Hudson's* constitutional analysis of the procedures surrounding the fair share fee notice. As evidenced by its repeated use of qualified phrases such as "[*B*]*asic* considerations of fairness," "*sufficient* information," and "*adequate* disclosure," *Hudson* implicitly rejects the strict requirements Kuehn attempts to impose on the notice requirement. *Hudson*, 475 U.S. at 307 (emphasis added). Accordingly, the Minnesota Court of Appeals correctly determined the financial data supplied by AFSCME Council 65 to be sufficient to meet the *Hudson* criteria.

Kuehn also posits that the financial statements included in AFSCME Council 65's notice are constitutionally deficient due to their lack of sufficient definition. Specifically, Kuehn asserts that *Hudson* requires a union to identify and define with particularity the specific union activities that constitute the categorized expenditures listed in its financial data and to provide specific information about the scientific methodology used in its cost ascertainment and allocation. This interpretation of *Hudson's* requirements stretches that decision beyond its logical limits. Nowhere does *Hudson* require this level of detail in its notice requirements. Instead, *Hudson* enunciates a need only for "sufficient information to gauge the propriety of the union's fee." Moreover, it specifically rejects a need for the union to provide an "exhaustive and detailed list of all of its expenditures." *Hudson*, 475 U.S. at 307, n. 18.

It is important to note the factual distinctions between the *Hudson* case and the instant matter. The *Hudson* notice was devoid of any listing of the union's chargeable expenses. The dissenting non-member was "left in the dark about the source of the agency fee." *Hudson*, 475 U.S. at 306. In contrast to that situation, the assessment notice afforded Kuehn by AFSCME

Council 65 detailed the major categories of expenditures, both chargeable and non-chargeable to the non-union employee. Thus, Kuehn was procedurally protected in the very manner envisioned by the *Hudson* Court. He was given all the necessary information by which "to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306. Far from deliberately creating a conflict with the *Hudson* decision, the Minnesota Court of Appeals has written a well-reasoned opinion that incorporates and upholds the broad principles *Hudson* establishes. Kuehn's attempt to manufacture a conflict where none legitimately occurs falls flat in light of the Minnesota Court of Appeals' thoughtful response to the *Hudson* opinion.

Kuehn's final argument is that his First and Fourteenth Amendment rights under the United States Constitution have been violated due to the inclusion of per capita tax payments to affiliated organizations in his fair share fee assessment. While Kuehn cloaks his argument in constitutional terms, it is merely a factual issue already decided by the Minnesota Court of Appeals based on the findings of the BMS which were supported by the evidence and affirmed by PERB. The BMS specifically found that the organizational bodies to which per capita taxes were paid provided services to AFSCME Council 65 by aiding in its collective bargaining and contract administration responsibilities. (Petition, Appendix D, p. 36a.) Not only does the record establish the integrated nature of these organizations and, thus, the propriety of the per capita tax payments, but relevant caselaw supports this inclusion as well. In *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987), the court held that the union's notice of fair share fee must include an accounting of payments to the affiliated state and national labor organizations. This finding implicitly recognizes the legitimacy of such inclusions under the circumstances of that case. A factual determination by this Court on

this issue will not decide an important question of federal law having precedential value. Instead, this issue is fact specific and not conducive to the establishment of a broad principle of law having wide application in a variety of cases.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by Petitioner Kuehn should be denied.

Respectfully submitted,

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APPENDIX

Minn. Rules pt. 5510.1410

5510.1410 FAIR SHARE FEE REQUIREMENTS.

Subpart 1. Advance notice of fair share fee assessment. The exclusive representative must provide written notice of the amount of the fair share fee assessment to the commissioner, the employer, and each employee assessed: upon initial implementation of the fair share fee assessment; to employees hired after the original notice has been issued; and upon a change in the amount of the fair share fee assessment. The notice must contain:

A. the name, address, and telephone number of the exclusive representative;

B. the amount of the regular dues of the exclusive representative;

C. the amount of the fair share fee assessment;

D. sufficient information to identify expenditures for benefits available only to members of the exclusive representative and sufficient information to identify expenditures for collective bargaining and contract administration services that have been provided for bargaining unit employees without regard to membership status;

E. the bureau's current mailing address; and

F. a statement as follows: "An employee may challenge this assessment by filing a challenge with the Bureau of Mediation Services within 30 calendar days after receipt of this notice. The challenge must specify those portions of the assessment being contested and the reasons therefor, and copies of the challenge must be sent to your employer and this organization. The Public Employment Labor Relations Act requires a fee for filing challenges. Forms for challenges and

a copy of the rules governing them are available from the bureau without charge."

Subp. 2. Employer provided information. Unless an alternate method of fair share notice procedure has been requested and approved by the commissioner, the employer shall provide to the exclusive representative the name, home mailing address, and social security number or other necessary payroll deduction information for all employees in the appropriate unit. Questions of necessary payroll deduction information shall be determined by the commissioner.

Subp. 3. Mailing notice. Unless an alternate method of fair share notice procedure has been requested and approved by the commissioner, the notice of the fair share fee assessment shall be mailed by the exclusive representative to the employee's last known home mailing address provided by the employer.

Subp. 4. Assessment. On the effective day of the fair share fee assessment and thereafter, the amount of the assessment shall be deducted by the employer from the pay of the employee. The amounts deducted must be held in escrow by the employer and not remitted to the exclusive representative for a period of 30 calendar days from the date notice is provided under subpart 1.

If at the end of the 30-day period an employee has not challenged the fair share fee assessment, assessments shall be remitted to the exclusive representative without the need for escrow by the employer.

If an employee challenges the fair share fee assessment, the assessment for that employee shall continue to be deducted, but must be held in escrow by the employer until otherwise ordered by the commissioner.

Statutory Authority: *MS s 179A.04 subd 3 cl (f)*

History: *9 SR 735; 11 SR 669; L 1987 c 186 s 15*

Minn Stat. § 179A.04

179A.04 COMMISSIONER'S POWER, AUTHORITY, AND DUTIES.

Subdivision 1. Petitions. The commissioner shall accept and investigate all petitions for:

(a) certification or decertification as the exclusive representative of an appropriate unit;

(b) mediation services;

(c) any election or other voting procedures provided for in sections 179A.01 to 179A.25;

(d) certification to the board of arbitration; and

(e) fair share fee challenges, upon the receipt of a filing fee. The commissioner shall hear and decide all issues in a fair share fee challenge.

Subd. 2. Unit determination. The commissioner shall determine appropriate units, under the criteria of section 179A.09.

Subd. 3. Other duties. The commissioner shall:

(a) provide mediation services as requested by the parties until the parties reach agreement. The commissioner may continue to assist parties after they have submitted their final positions for interest arbitration;

(b) issue notices, subpoenas, and orders required by law to carry out duties under sections 179A.01 to 179A.25;

(c) certify to the board items of dispute between parties subject to action of the board under section 179A.16;

(d) assist the parties in formulating petitions, notices, and other papers required to be filed with the commissioner or the board;

(e) certify the final results of any election or other voting procedure conducted under sections 179A.01 to 179A.25;

(f) adopt rules regulating the forms of petitions, notices, and orders; and the conduct of hearings and elections;

(g) receive, catalogue, and file all orders and decisions of the board, all decisions of arbitration panels authorized by sections 179A.01 to 179A.25, all grievance arbitration decisions, and the commissioner's orders and decisions. All orders and decisions catalogued and filed shall be readily available to the public;

(h) adopt, subject to chapter 14, a grievance procedure to fulfill the purposes of section 179A.20, subdivision 4. The grievance procedure shall not provide for the services of the bureau of mediation services. The grievance procedure shall be available to any employee in a unit not covered by a contractual grievance procedure;

(i) conduct elections;

(j) maintain a schedule of state employee classifications or positions assigned to each unit established in section 179A.10, subdivision 2;

(k) collect such fees as are established by rule for empanelment of persons on the labor arbitrator roster maintained by the commissioner or in conjunction with fair share fee challenges.

Subd. 4. Location of hearings. Hearings and mediation meetings authorized by this section shall be held at a time and place determined by the commissioner, but, whenever practical, a hearing shall be held in the general geographic area where the question has arisen or exists.

History: *1984 c 462 s 5; 1985 c 157 s 1; 1987 c 186 s 15*

Minn. Stat. § 179A.05

179A.05 PUBLIC EMPLOYMENT RELATIONS BOARD; POWERS AND DUTIES.

Subdivision 1. Membership. The public employment relations board is established with five members appointed by the governor. Two members shall be representative of public em-

ployees; two shall be representative of public employers; and one shall be representative of the public at large. Public employers and employee organizations representing public employees may submit for consideration names of persons representing their interests. The board shall select one of its members to serve as chair for a term beginning May 1 each year.

Subd. 2. Terms, compensation. The membership terms, compensation, removal of members, and filling of vacancies on the board shall be as provided in section 15.0575.

Subd. 3. Rules, meetings. The board shall adopt rules governing its procedure and shall hold meetings as prescribed in those rules. The chair shall preside at meetings of the board.

Subd. 4. Other powers. In addition to the other powers and duties given it by law, the board has the following powers and duties:

(a) to hear and decide appeals from determinations of the commissioner relating to "supervisory employee," "confidential employee," "essential employee," or "professional employee";

(b) to hear and decide appeals from determinations of the commissioner relating to the appropriateness of a unit;

(c) to hear and decide on the record, determinations of the commissioner relating to a fair share fee challenge;

(d) collect such fees as are established by rule for empanelment of persons on the labor arbitrator roster maintained by the board.

Subd. 5. Appeals. The board shall adopt rules under chapter 14 governing the presentation of issues and the taking of appeals relating to matters included in subdivision 4. All issues and appeals presented to the board shall be determined upon the record established by the commissioner, except that the board may request additional evidence when necessary or helpful.

Subd. 6. List of arbitrators. The board shall maintain a list of names of arbitrators qualified by experience and training in the field of labor management negotiations and arbitration. Names on the list may be selected and removed at any time by a majority of the board. In maintaining the list the board shall, to the maximum extent possible, select persons from varying geographical areas of the state.

Subd. 7. Arbitration. The board shall provide the parties with a list of arbitrators under section 179A.16, subdivision 4.

History: *1984 c 462 s 6; 1985 c 157 s 2; 1986 c 444; 1987 c 186 s 15*